



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO. FSD 227 OF 2017 (IKJ)

**IN THE MATTER OF PART XVI OF THE COMPANIES LAW (2016 REVISION)
AND IN THE MATTER OF XIAODU LIFE TECHNOLOGY LTD**

IN CHAMBERS

Appearances: Mr Mac Imrie KC and Mr Malachi Sweetman, Maples and Calder (Cayman) LLP (“Maples”), on behalf of Xiaodu Life Technology Ltd (the “Company”)

Mr David Chivers KC of counsel instructed by Ms Farrah Sbaiti and Mr Greg Coburn of Ogier (Cayman) LLP (“Ogier”) for Waterwood 020 Project Limited (the “Dissenter”)

Before: The Hon. Justice Kawaley

Heard: 23-24 February 2023

Date of decision: 24 February 2023

**Draft Reasons
Circulated:** 2 March 2023

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HEADNOTE

Petition under section 238 of the Companies Act- application for specific discovery by dissenter- whether forensic expert should be appointed to assist with discovery -failure by company to strictly comply with order requiring affidavit to be sworn by a “duly appointed officer”- whether company’s disclosure process should be further verified

REASONS FOR DECISION**Background**

1. This is an appraisal proceeding originally commenced under section 238 of the Companies Law (2016 Revision) by Petition dated 24 August 2017, nearly six years ago. Its presentation followed a merger (“the Merger”) between the Company and Rajax Holding (“Rajax”), a subsidiary of Eleme. Pre-Merger, the Company was 66% owned by Baidu (Hong Kong) Limited (“Baidu HK”). Its subsidiaries conducted an online food purchasing and delivery business in the People's Republic of China.
2. The Dissenter (Waterwood 020 Project Limited) acquired its shares in the Company, which was not a listed one, in 2015 for US\$125 million. The Dissenter rejected the post-Merger offer, described in the Petition (paragraph 17) as “US\$24,500,000 plus 31,577,445 Series G-1 preferred shares of Rajax Holding” (an offer worth approximately US\$42 million)¹ for its shares.
3. In mid-March 2021 (15-16 March), I heard three Summonses, only one of which is directly relevant to the present application. By a Summons dated 25 November 2020, the Dissenter sought Specific Discovery, an application which I granted in part on 16 March 2021 according to the Transcript and my Judgment dated 28 April 2021 setting out reasons for that decision. The Order giving effect to that decision was, erroneously it seems to me, dated 15 March 2021 but I will continue to refer to it as such. One of other two Summonses was the Dissenter’s Letter of Request Summons (designed to facilitate access through the Hong Kong Court) to documents held by Baidu HK.
4. The material terms of the 15 March 2021 Specific Discovery Order provided as follows:

¹ Transcript Day 1, page 102 line 10 - page 103 line 3.

“1. Pursuant to Order 24, rule 7 of the Grand Court Rules (GCR) and subject to paragraph 2 of this Order a duly appointed officer of the Company shall, within 28 days of the date of this Order, make and serve on the Dissenter an affidavit stating:

a. whether any document specified or described in the schedule attached hereto (Schedule) is, or has at any time been, in the possession, custody or power of the Company and if not now in the possession, custody or power of the Company when it parted with it and what has become of it;

b. if and to the extent that any of the documents specified or described in paragraph 1 of the Schedule are stated not to be in the possession, custody or power of the Company:

i. the basis on which it is said that such documents are not in the Company’s possession, custody or power, notwithstanding the fact that the Custodians (as defined therein) were officers and/or employees of the Company at the material time; and

ii. what steps the Company has taken to obtain such documents from any third party, including the date of any request for the same, the identity of the party of whom the request was made, and any response received.

2. The application of paragraph 1 of this Order to the documents specified in paragraph 3(a) of the Schedule is adjourned generally with liberty to restore, and the parties shall each endeavour within a reasonable time from the making of this Order to reach an agreement allowing the Dissenter's expert access the documents specified at paragraph 3(a) in order to sample, test, extract and analyse all, or relevant portions, of the operational data and/or summaries of the operational data.”

5. In short, paragraph 1 required the Company to file an affidavit by “*a duly appointed officer of the Company*” in relation to documents identified in paragraph 1 of the Schedule. Paragraph 2 (a) adjourned the question of whether a similar order should be made in relation to the “*operational data*” (which the Dissenter’s Valuation Expert requested access to (“Operational Data”)) and (b)

directed the parties to use their best endeavours to resolve the, at that point, ill-defined logistics of how that data could be made accessible.

6. In purported compliance with paragraph 1 of the 15 March 2021 Order, the company filed the Second Affirmation of Yi Yang dated 20 May 2021 and the Second Affirmation of Jinping Jiang. Neither deponent was or purported to be “*a duly appointed officer of the Company*”; instead they were legal representatives of the Company’s attorneys and Rajax Holding who were conducting the discovery process in the present proceedings. It is relevant to note that on 16 June 2021 I made a Specific Discovery Order against the Dissenter which also required it to file an affidavit by “*a duly appointed officer of the Company*”. This Order was also purportedly complied with by the Dissenter filing an Affirmation made by an affiant who was a legal representative of the Dissenter’s attorneys conducting the discovery exercise in these proceedings; there was no suggestion that the First Affirmation of Jo Yee Cheung dated 7 July 2021 was made by “*a duly appointed officer of the Company*”. The Third Affirmation of Fang Fang was merely made “*to clarify the matters referred to*” in the 28 April 2021 Judgment.
7. It was against this background that the Dissenter’s 25 March 2022 Summons was filed seeking, in summary, the following relief:
 - (a) an Order that the Company preserve all “Electronic Devices” including those storing Operational Data;
 - (b) an Order that a duly appointed officer of the Company provide an affidavit as required by paragraph 1 of the 15 March 2021 Order in relation to;
 - (c) an Order that each party designate “*Keywords*” for searching all electronic devices; and
 - (d) an Order appointing a Forensic Expert to carry out a Forensic Audit of the Company’s information technology systems and all Electronic Devices.
8. This Summons was supported by the Second Affirmation of Jo Yee Cheung dated 22 March 2022 (“Cheung 2”) and the Fourth Affirmation of Mark Bezant, the Dissenter’s Valuation Expert,

dated 23 March 2022 (“Bezant 4”). The Company filed no responsive evidence and was content to rely on the evidence filed before and pursuant to the 15 March 2021 Order.

9. At the conclusion of the two day hearing on 24 February 2023, I declined to grant heads (a) to (c) of the relief sought. Instead I granted a more limited form of Forensic Expert Order, based substantially on the form of order proposed by the Company’s attorneys under cover of a 9 December 2022 letter attaching a draft Consent Order, albeit modified so as to, *inter alia*, incorporate elements of the preservation relief sought by the Dissenter. The aim of this relief was to essentially obtain an independent assessment as to the technical and financial implications of facilitating access to the operational data in light to the parties’ failure to effectively progress this matter since the 15 March 2021 Order.
10. These are the reasons for that decision together my promised provisional views on the costs of the intertwined hearings of March 2021 and February 2023 (which I have, in the event, formulated as provisional orders).

The factual matrix

The Dissenter’s evidence

11. Cheung 2 was explicitly sworn in support of the 22 March 2022 Summons. The affiant deposed in paragraph 9 of her Affirmation:

“9. The purpose of this affirmation is to outline the:

- (a) service of the Company’s evidence pursuant to the March Order;*
- (b) negotiations between the parties pursuant to the March Order regarding access to the Operational Data, which have broken down and are now at an end; and*
- (c) attempts by the Dissenter to resolve the matters in the March Order by consent with Baidu HK, which have resulted in the Dissenter being belatedly informed by Baidu HK that it has destroyed the Company documents it was holding.”*

12. The deponent firstly addressed the Company's response to the 15 March 2021 Order, essentially by way of reference to correspondence which she exhibited without making any positive averments of her own. For instance:

"21. On 20 August 2021, Ogier wrote to Maples outlining the fundamental shortcomings in the Company's evidence filed pursuant to the March Order. A copy of that letter is at pages 61 to 67 of 'JYC-2'..."

13. The next section in Cheung 2 is headed "*Negotiations regarding access to the Operational Data*". This topic is addressed by reference to a chain of exhibited correspondence beginning with an Ogier letter dated 20 May 2021 and ending with a Maples letter dated 29 September 2021. Section D of the Affirmation addresses "*Negotiations with Baidu*" in similar fashion. In short, no positive factual averments were affirmed in support of the Dissenter's present Summons. Bezant 4 is, unsurprisingly, more substantive.

14. The main averments in Bezant 4 can be summarised as follows:

- (a) the Expert makes the simple but incontestable point that he has not yet been given access to the Operational Data;
- (b) he confirms, mainly by reference to his Third Affidavit ("Bezant 3"), that he considers Operational Data to be relevant to his valuation assignment, averring:

"14. The importance of such analyses to the comprehensiveness and precision of the valuation is even greater, given that a number of other types of documents sought in specific discovery and from Baidu regarding the merger have not been provided.";

- (c) he explains why he believes the breakdowns he has requested must exist (based on what Mr Wei said in the Management Meeting);
- (d) he explains, by reference to letters from Maples on this topic which has been supplied (dated 25 May 2021, 25 August 2021 and 29 September 2021) why information he

has been supplied since his initial request was made does not adequately address his information requests.

15. It is striking that Mr Bezant does not appear to have been provided with Maples' 9 December 2022 letter which signified the first time the Company had advanced a positive proposal for furthering the access to Operational Data issue the parties had been ordered to use their best endeavours to agree upon in March 2021. He accordingly provides no basis for rejecting the Company's proposal. The Dissenters' 22 March 2022 Summons was accordingly essentially supported by:
 - (a) Bezant 4, viewed in the wider context of the evidence filed on both sides for the March 2021 hearing and his un-contradicted assertion that accessing the Operational Data was still necessary despite the Company's suggestions in correspondence that other information recently supplied filled the gaps of which he had initially complained; and
 - (b) the correspondence exhibited to Cheung 2.
16. There was accordingly only direct evidence in support of the Dissenter's application for the issue adjourned by paragraph 2 of the 15 March 2021 Order (which narrowly read was whether paragraph 1 of that Order should apply to the Operational Data) to be determined by this Court. There was no direct evidence in support of the applications for an Order that documents be preserved (25 March 2022 Summons, paragraph 1), for the Company's Affidavits to be re-sworn by duly appointed officers (25 March 2022 Summons, paragraph 2), for the parties to designate further Keywords (25 March 2022 Summons, paragraph 3), nor for the appointment of a Forensic Expert to carry out a Forensic Audit (25 March 2022 Summons, paragraph 4).
17. In these circumstances it is unsurprising that, bearing in mind the fact that, as Mr Imrie KC put it, the Dissenter had not really "engaged with" the Company's 'bolt-out-of-the blue' 9 December 2022 letter proposing a compromise on the Operational data issue, the Company elected to file no further evidence in specific opposition to the Dissenter's 22 March 2022 Summons.

The Company's evidence

18. The Company relied primarily on the Affirmations made pursuant to paragraph 2 of the 15 March 2021 Order, and arguments based on the correspondence produced by the Dissenters supplemented by the Company's own bundle of additional correspondence. However, the evidence placed before me at the March 2021 hearing was also relied upon to some extent.
19. The earliest Affidavit was the First Affidavit of Won Cheol Shin dated 15 February 2018 ("Shin 1"), which was initially sworn in relation to the first directions hearing. An associate with Maples and Calder's Hong Kong office with experience of discovery exercises in section 238, he described the steps initially taken between August 2017 and January 2018 to:
- (a) identify custodians of potentially relevant documents;
 - (b) preserve documents and files;
 - (c) retrieving and reviewing documents potentially relevant to the Merger;
 - (d) engaging an e-Discovery service provider;
 - (e) creating an 'Initial Data Set' of 650,000 documents, which was reduced into a roughly 350,000 document Review Data Set; and
 - (f) identifying a further subset of documents requested from Baidu HK which were not within the Company's control.
20. The First Affidavit of William Kennedy dated 5 February 2021 ("Kennedy 1") was not provided by the deponent, a Duff & Phelps valuation advisor, as an independent expert. Nonetheless he deposed that he considered the request to extract and analyse the raw data in relation to all of the Company's transactions was unprecedented, would be a costly exercise, was overly broad and was not necessary for the valuation exercise required in the present case.

21. The First Affirmation of Jinping Jiang dated 25 February 2021 (“Jiang 1”) was made in response to the Dissenter’s Specific Discovery Summons and by the Rajax general counsel. In paragraph 1 he avers: “*I confirm that I am authorised to make this affirmation on behalf of Xiaodu Life Technology Ltd... and do so in response to the contents of this Honourable Court’s ruling on the Dissenters’ [sic] Discovery Summons dated 16 March 2021...and the...order resulting therefrom.*” How he acquired personal knowledge about the Company’s discovery efforts was explained by reference to his assuming responsibility for the Company’s legal affairs in June 2019.
22. Mr Jiang substantively deposed that, *inter alia*:
- (a) 22,000 documents had been uploaded to the Company’s data room and seven information requests had been responded to and the Management Meeting had taken place;
 - (b) some success had been achieved in obtaining documents from Baidu HK, such as the emails from Bo Yang, Dick Wei and other custodians. The Skadden documents had now been uploaded; and
 - (c) the Operational Data (or raw data) was huge: 2.5 petabytes or 2.5 million gigabytes. It was probably unusable by Mr Bezant, a platform was needed to access it and data can be damaged during the extraction process. In any event some data had been provided in response to Question 71 of the Fourth FTI Information Request and financial data extracted from the database was already reflected in financial statements.
23. The Second Affirmation of Yi Yang dated 20 May 2021 (“Yang 2”) was made in response to the Court’s 15 March 2021 Order. Employed by Maples for more than three years, she has “*worked on a number of s.238 appraisal cases with a particular focus on the collection of documents from PRC-based clients and companies*” (paragraph 2). She described travelling to the Company’s office in Beijing in December 2017 and the steps she took with Mr Shin in the initial discovery process. An account was then set out of the documents obtained and/or sought from the 11 custodians identified in response to FTI’s Fourth Information Request (Question 83(h)).

Zhenbing Gong was interviewed but said he had no relevant documents on his laptop; Qiaorong Zhao was on long-term sick leave and her laptop was never recovered². In relation to the Skadden documents, she deposed:

“21. I understand that the Company, without any waiver of privilege, has decided to share copies of the relevant Skadden documents which are subject to a claim of legal advice privilege (as opposed to litigation privilege) with the Dissenter...”

24. As regards Operational Data, Ms Yang noted that the Company was waiting to hear from Mr Bezant or Ogier as to what was sought pursuant to the 15 March 2001 Order. As regards “weekly meetings”, the deponent explained that the documents actually referred to by Mr Wei at the Management Meeting had now been uploaded. As regards documents relating to the valuation of the Company during the Series A and Series B financing rounds, Ms Yang, after noting that the Dissenter ought have Series A documents as a lead investor, confirmed the assertion in Jiang 1 that *“to the best of the Company’s knowledge and belief, there are no further documents relevant to this issue in the Company’s possession, custody or power”* (paragraph 30). Finally as regards documents relating to the Merger negotiations, these took place between Baidu and Rajax directly and the Company *“believes after reasonable inquiry and efforts that no such documents exist within the universe of documents collected”* (paragraph 34).

The correspondence

25. The correspondence will be considered briefly in relation to the four main topics arising from the Dissenter’s 25 March 2022 Summons, (a) whether there should be a Preservation Order, (b) the need for duly appointed officers of the Company to provide evidence (and to deal more fully with matters such as common interest privilege, management meetings, the merger negotiations and negotiations between Series A and B investors, (c) the need for further Keyword searches, (d) the need for a Forensic Audit and (e) the one outstanding issue arising under the Dissenter’s Specific Discovery Summons of access to Operational Data. In many ways the correspondence is most notable for what the parties did not address rather than what they did explicitly deal with.
26. The correspondence was most extensively referred to in relation to the Operational Data issue and the question of whether or not the Company had complied with the letter and/or spirit of the 15

² Mr Gong was said to be the CEO and Ms Zhao a legal officer: Transcript Day 1 pages 25 line 21-page 26 line 15.

March 2021 Order and used its best endeavours to agree a means of access for the Dissenter's Expert. Some of this material overlapped with the question of the need for a Preservation Order. One freestanding document preservation related email which was referred to in the course of argument was an email from Maples to Ogier dated 28 September 2021:

"We are instructed that whilst in the process of obtaining internal approvals and co-ordinating the collection process with its IT department, it has come to our client's attention that emails are routinely deleted from its email server after a certain period, due to the capacity of its email server.

Our client was checking the IT capacity in order to conduct the searches and made the relevant inquiries with its IT Department, which has confirmed that the Custodian Emails are no longer accessible. This also applies to the emails of the employees who were Xiaodu employees during the relevant period."

27. I do not recall being taken to any subsequent correspondence requiring the Company to take steps to preserve other records which might become inaccessible, nor was any such correspondence referred to in the Dissenter's Skeleton Argument. As regards the extent to which the Company's evidence complied with the 15 March 2021 Order, this topic was addressed by Ogier's letter to Maples dated 20 August 2021, which referenced the "*fundamental shortcomings in the evidence filed in response to the Discovery Order*". As a prelude to setting out roughly four pages of detailed (if not intricate) questions about the contents of Jiang 2, the complaints were distilled as follows:

"6 As Kawaley J has already found, Mr Jiang is not an officer of the Company. The evidence served by the Company was therefore not only late, but as no affidavit was served from an officer of the Company, the Company is in breach of the Discovery Order.

7. Compounding the ongoing breach of the Discovery Order, both Yang 2 and Jiang 2 have failed to address Kawaley J's clear criticism of Mr Jiang in the Ruling in that the sources of information and belief on matters outside the personal knowledge of each affiant in relation to various critical assertions have again been hidden."

28. Not without some chiding by Ogier, Maples responded feistily on 13 September 2021 to this correspondence. By way of opening comment, after general refutation of the points Ogier had made, it was asserted:

“Based on your firm’s previous efforts to create a voluminous chain of irrelevant correspondence and ignore the answers that we have provided, we expect it will be necessary for the parties to return to Court to resolve these issues and have the case set down for a hearing. Your client is not progressing the third party disclosure applications against Baidu with any degree of urgency, and your latest questions seem direct[ed] solely at stalling the case by raising bad points, and deflecting responsibility for your client’s dilatory approach.”

29. As regards the requirement that the deponents be “*duly appointed officers of the Company*”, the response was broadly consistent with the position adopted at the hearing. As regards Mr Jiang, it was contended that he was a *de facto* officer of the Company authorised to give evidence on its behalf and pointed out that the Dissenters had adopted a similar approach to their own evidence. As regards Ms Yang, it was merely pointed out that she had personal knowledge of the discovery process, primarily to criticise the need to interrogate the sources of her information and belief. The letter then proceeded to answer questions where considered appropriate having regard to relevance and proportionality. As regards Jiang 2, the complaints raised in the 20 August 2021 Ogier letter were described as “*graspingly futile*”. Some questions were not answered on the grounds of constituting an “*improper attempt to extract privileged information*”; the answers to others were said to be “*implicit from Jiang 2 and do not require a further affirmation*”. A similar approach was adopted to the questions raised in relation to Yang 2. More of these questions were answered, although one question was said to be “*unintelligible*”. If I was referred to any other correspondence on the compliance of Yang 2 and Jiang 2 with the 15 March 2021 Order, it did not have any material impact on my adjudication of this issue.
30. More attention was given in the Dissenter’s evidence, the respective Skeleton Arguments and in the course of oral argument, to the correspondence relating to the Operational Data. Ogier ‘opened the bowling’ on this issue with their 20 May 2021 letter. It most pertinently stated:

“During the hearing, Kawaley J suggested that ‘a starting assumption should be that the proposal made by the Company’s own expert about some form of access to all of the [Operational Data] is something that should be considered.’ However, we are yet to receive any proposal from the Company and/or the Company’s expert. As it is the Company that possesses the database holding the Operational Data, along with the complete knowledge as to its operation, we look forward to receiving a proposal from the Company and/or its expert as to how Mr Bezant may access the Operational Data for the purposes of his valuation...”

31. The response of Maples on 25 May 2021 included the following ingredients:

- (a) it was insisted that the onus was on Mr Bezant *“to say what he needs”*;
- (b) the Dissenter or Mr Bezant was asked to explain why, if this was the case, the *“57 categories of aggregated operating data previously provided”* did not respond to his previous request for *“extracts and summaries”*; and
- (c) Maples expressed their *“client’s concerns that that Mr Bezant’s report and opinion are being unnecessarily delayed by his inappropriate requests”*.

32. By letter dated 15 June 2021, Ogier indicated that Mr Bezant accepted that the 57 categories were relevant but considered that they were incomplete for three clearly articulated reasons. It was argued it made no sense to suggest that Mr Bezant should initiate a proposal in relation to metrics which were within the knowledge of the Company. The letter concluded in conciliatory tones with Mr Bezant’s suggestions as to three matters that might assist the Company to meet his request. In their 25 August 2021 response, Maples indicated that these suggestions were unhelpful because (a) the data was, as previously explained, *“in raw form”*, (b) other than those in the Spreadsheet, there were no further descriptions or explanatory notes, and (c) all available financial reports had already been uploaded. The following complaint was also made:

“4.5 Neither Mr Bezant nor your firm has asked any questions about the disclosed difficulty of extracting raw data, or about the explanations in the notes which answer the new question about why the date ranges are limited.”

33. Rightly inferring that the Company was indicating its sustained objection in principle to the idea of affording access to the Operational Data, Ogier in their letter dated 14 September 2021 indicated their continued willingness to compromise and suggested that Mr Bezant might prepare a template of the information he sought which the Company could fill in itself. Maples' 29 September 2021 response all but shut the door on any compromise indicating that the Company's response to any template which might be submitted was likely to be as follows:
- (a) the Company did not accept that Mr Bezant's approach in relation to raw data was appropriate in the present case and was unprecedented in section 238 cases;
 - (b) it was contended that the "*suggestion that the former Management of Xiaodu, some four years after the Merger date, should now be required to provide information to Mr Bezant which was not utilised at the time is highly irregular*";
 - (c) it had been indicated on 18 April 2019 that "*the raw data was incomplete, held on an unstable and out-dated platform, and not capable of being, and not capable of being transferred or accurately analysed*". It should have been obvious to Mr Bezant that the analysis he wanted to undertake was not possible;
 - (d) it was impossible to access the raw data (1) because the Company's systems for doing so were now obsolete and (2) not all data was retained on the current platform for technical reasons;
 - (e) a PwC datapack found with the assistance of Rajax would soon be uploaded to the data room and this would likely provide what Mr Bezant required.
34. Unsurprisingly, in my judgment, the Dissenter decided to take a long 'time-out' on attempting to reach an agreement on accessing the Operational Data. The next step was to file the 15 March 2022 'Forensic Audit and Specific Disclosure' Summons. There were minor skirmishes in the early summer over who was to blame for delay, about an interim payment and about directions for the hearing of the present Summons. Against this background, the Company's attorneys' 9 December 2022 letter making a positive proposal for access to the Operating Data (described as

the “Historic Data”) was indeed like a bolt out of the blue. After contending that accessing the Historic Data should not be ordered on relevance and technical grounds, the letter pivotally stated as follows:

“8. In the course of preparing for this application the Company has identified the database on which the Historic Data is currently located. Without prejudice to the position set out above, or to any arguments the Company may wish to make in response to the merits of the Summons, in the interests of reaching agreement and moving the case forward, the company is prepared to enable a Forensic Expert to review and retrieve such parts of the Historic Data that Mr Bezant believes may be helpful—namely those set out in paragraph 16 of his 3rd Affirmation.

9. We have therefore prepared the attached draft consent order setting out the basis for the review and production of the Historic Data. The terms of the order require the Dissenter to bear the costs of the review and to conduct it in a manner that complies with the relevant PRC laws, including without limitation, laws and regulations governing the cross-border transfer of data. The result will be that a forensic expert to be appointed jointly by the parties will be able to review the Historic Data so that, if necessary, it can be produced and relied upon by the experts. Please note that, as previously stated the Company does not believe that it has the software likely to be required in order to conduct the review process that Mr Bezant has referred to, or that such review will enable the information sought by Mr Bezant to be produced. By paying for the Forensic Audit, Waterwood will be able to determine that for itself.

10. If it is not possible to reach agreement on the terms for the resolution of the Summons, the Company intends to oppose the Summons in its entirety and although it does not intend filing reply evidence, it will rely on this correspondence as necessary to demonstrate its position....”

35. Ogier’s 11 January 2023 response to this proposal was a distinctly lukewarm one. Perhaps the Company’s dramatic and belated change of stance to the Court’s enjoining the parties to seek a compromise had a stunning effect. Ogier’s letter primarily (a) expressed surprise at the apparently recent discovery of the Operational Data, (b) took issue with the Company’s maintained objection

in principle to providing Mr Bezant with access to it, and (c) insisted on the need for a comprehensive Forensic Audit. The Company's proposal itself was summarily rejected in the following terse terms:

“The Proposal is clearly a thinly veiled attempt to conflate the heads of relief being sought by our client's Summons and does not discharge the nature and extent of the relief sought in the Historic Operational data Application and/or the Forensic Audit Application.”

Findings

Preservation Order (25 March 2022 Summons paragraph 1)

36. No coherent argument was advanced in support of the application for a Preservation Order. In the Dissenter's Skeleton Argument, the word “preservation” appeared once, embedded in a passage dealing with a different point:

“37. What remains unclear is what, if any, steps the Company took to try to preserve the Custodians' documents held on the Baidu server. It is unclear whether any request for such preservation was ever made; the evidence served by the Company does not refer to one. Nor is any explanation given as to why the Company did not seek to enforce the right which it now says it believes it had to obtain documents from Baidu.”

37. With no direct evidential support for this head of relief, Mr Chivers KC was effectively tasked with turning sand into gold through oral submissions. Reference was made to the fact that Dissenter had wasted six months negotiating with Baidu over access to documents only to be told that emails had been unintentionally deleted without any human agency. A valid criticism of the efficacy of the Company's initial steps to preserve documents held on Baidu's servers was made out. The fact that information from two Company laptops belonging to significant staff members (the CEO and legal counsel) had never been examined also appeared to be a valid criticism in abstract terms. Viewed practically, however, it seemed odd that the Dissenter was only in February 2023 relying on these conservation deficiencies which occurred in 2017-2018 (and were disclosed in Yang 2 in February 2021) as indicative of real concern about the need to preserve such information. Nonetheless, Mr Chivers KC suggested that the overall picture, taking into account the Company's admission that the Operational Data was “*unstable*”, supported the case for a Preservation Order.

38. In the Company's Skeleton Argument, this point was in summary addressed in the following terms:

“4.1 The preservation order is unnecessary at this late stage, and there is no evidence from the Dissenters, nor any reasonable basis for a submission from their counsel, that the Company has destroyed or will destroy relevant documents, or that orders are required to ensure that the documents which have been identified as relevant (and preserved for the last 5 years plus) will now be lost if such an order is not made. To the extent that the Dissenters have raised concerns about the Company's disclosure exercise, those have been addressed and resolved by the affirmation evidence provided by the Company in June 2021, in response to the specific discovery application...”

39. Despite Mr Chivers' KC's able advocacy, the Company's written submissions on this point were ultimately compelling and I did not hear Mr Imrie KC by way of oral reply. In short, Preservation Orders will save in unusually clear cases need to be supported by positive evidence and will generally be viewed as lacking substance if relief is not sought promptly. In the present case, there was no direct evidential foundation for the relief sought and the application was pursued at a leisurely pace. There was no sufficient basis made out for granting a Preservation Order.

Affidavit sworn by a “duly appointed officer of the Company” in relation to the Operational Data (15 March 2021 Order paragraph 2 / 25 March 2022 Summons paragraph 2)

40. Paragraph 2 of the 25 March 2022 Summons was seemingly sought on the basis that the Company had failed to comply with paragraph 2 of the 15 March 2021 Order. In the Dissenter's Skeleton Argument it was submitted:

“28. The first point to note is that neither Ms Yang nor Mr Jiang is a duly appointed officer of the Company. At the time of making the affirmations, Ms Yang was a senior litigation paralegal at Maples & Calder and Mr Jiang was the general counsel for Rajax Holding, the parent company of the Company. Accordingly, the Company has not complied with the Court's Order. That is significant, not only in itself but also because, as the Judgment made clear, the very reason why the Order provided that the affidavit

evidence in question was to be provided by a duly appointed officer of the Company was that Mr Jiang, who had provided the Company's evidence for the hearing in March 2021, was not an officer and his evidence was deficient in a number of respects. In particular, paragraph 22 of the Judgment stated:

'This is not a normal case. Firstly, Mr Jiang, the Company's main deponent is not an officer of the Company at all. He is an employee of the post-Merger parent company and does not even seek to suggest that he has personal knowledge of the Company's record-keeping practices before the Merger occurred and when the Merger was being negotiated. Moreover, despite promising (at paragraph 2) to indicate the sources of his information and belief on matters he has no personal knowledge of, he fails to do so when making various critical assertions in relation to the present application.'

29. In such circumstances, it is extraordinary that no affidavit has been provided by a duly appointed officer of the Company, as required by the Order. No explanation is offered in either affirmation as to why a duly appointed officer is not a deponent, nor was any application made to the Court for a variation of the Order. The Company's stance is, in the Dissenter's submission, yet further evidence of its cavalier approach to its discovery obligations in this case."

41. I was almost swept away by the forceful current of Mr Chivers KC's oral submissions. I was bound to accept that technically neither of the Company's deponents were the persons the Order on its face required them to be. But the question was whether this was a substantive requirement or more an accidental inclusion of standard wording borrowed from a context in which it was not common ground that discovery would be deposed to by bilingual or multilingual lawyers and/or paralegals, who had taken instructions from clients in China and/or Hong Kong. In the present case, as Mr Imrie KC was keen to point out, the Dissenter's own evidence in response to this Court's Order dated 16 June 2021 requiring an Affidavit from a "*duly appointed officer of the Dissenter*" had been sworn by just such a legal team member. In fact the transcript for the hearing when the 15 March 2021 Order was made clearly demonstrates that the concerns later recorded in my 28 April 2021 reasons for decision did not relate to matters of corporate authority at all:

“In essence, I find that the Jiang affidavit is not enough for the court to be satisfied because the deponent does not condescend to sufficient detail in terms of explaining precisely what his personal knowledge was and does not go into sufficient detail about the discovery process. Those concerns are shaped, in large part, by the fact that he is not someone who can be assumed to have personal knowledge of the discovery process-even though he may have more knowledge than he has actually revealed thus far...”³

[Emphasis added]

42. The concerns which prompted paragraph 2 of the 15 March 2021 Order were, the Dissenter’s counsel’s protestations to the contrary notwithstanding, were adequately met by Jiang 2 and Yang 2. Paragraph 2 was substantially complied with and no need for any further Order in relation to the Operational Data was required in light of the Company’s belated concession that access should be given to the Experts, albeit via a somewhat different route than had been canvassed prior to 9 December 2022. I reached this conclusion despite the fact that the Dissenter’s counsel demonstrated that prior to the 9 December compromise offer, which I have characterised as a bolt out of the blue, the Company had failed to comply with best endeavours to compromise requirements of the same Order. This head of relief was refused for these reasons.
43. By way of postscript, I was willing to accept from Mr Imrie KC his unchallenged assertion that in recent section 238 cases discovery has been managed and deposed to by members of the respective legal teams⁴. If this is the case, as it clearly is in the instant case, an alternative form of wording should be used in discovery orders. Affidavits should, perhaps, be ordered to be provided by ‘a duly authorised representative of’ the company or the dissenter. This does not mean that cases may not arise where there are tangible grounds for not trusting the corporate management to honestly provide discovery to their legal team. In such cases, no doubt counsel will be astute to raise such concerns at the earliest possible stage. This may well be unlikely to occur in the merger context, because few investors are likely invest huge sums in merging with a company managed by individuals lacking in trust.

Keywords searches of all emails and electronic devices (25 March 2022 Summons paragraph 3)

³ Transcript, 16 March 2021 page 57 B-D; Core Bundle TAB 7 page 223.

⁴ Transcript Day 1 page 161 line 16-page 162 line 22.

44. The Dissenter did not pursue, seriously or at all, the relief set out in paragraph 3 of its Summons. Paragraph required the parties within 7 days of the Order to designate “Keywords” to be used for searches of “*all emails...and/or other Electronic Devices used by or available to the Company...*”

45. In its Skeleton Argument, the present application was described in the following terms:

“1. This skeleton argument is filed on behalf of the applicant, Waterwood 020 Project Limited (“the Dissenter”) in support of its application, made by Summons dated 25 March 2022 (“the Summons”), for orders for:

(i) Specific discovery pursuant to O.24, r.7 of the Grand Court Rules (“GCR”) of the operational data from Xiaodu Life Technology Limited’s (‘the Company’) operating platform system and/ or database containing all raw data (‘the Operational Data’).

(ii) The appointment of an independent forensic technology expert pursuant to O.24, rr. 7, 8 and 20(1) GCR and/ or the Court’s inherent jurisdiction to conduct an audit of the Company’s information technology systems and infrastructure and all electronic devices used by or available to the Company and its directors, officers or employees or anyone else on the Company’s behalf.”

46. Paragraph 3 was not addressed in the Petitioner’s Skeleton Argument where, having performed my own key word search for the word “keyword”, the word does not seem to even appear. In the Company’s Skeleton Argument (at paragraph 4.1), the following submissions were made:

“...Likewise, a keyword search order is unnecessary and would be duplicative because the Company utilised that technology to comply with its disclosure requests many years ago, and the Dissenter contributed certain of the keywords which the Company used. It is not clear what the Dissenters seek to obtain from such an exercise, as they have not filed any evidence as to why it might be necessary, nor suggested any keywords, nor has the issue been raised in correspondence either before or after the Summons was issued 11 months ago...”

47. In oral argument, Mr Chivers KC made the following submission by way of introduction to the relief sought under the Summons:

*“...Then paragraphs 3 and 4 onwards all relate to the forensic expert audit. So you start off with the keywords, and then there’s the mechanics for the appointment of forensic experts...”*⁵

48. I failed to grasp this oral submission and apprehend the connection between paragraphs 3 and 4, which in fact explained why it was not addressed as a freestanding topic in the Dissenter’s Skeleton Argument. I take solace from the fact that the Company’s counsel, based on their Skeleton Argument, failed to apprehend that paragraph 3 was in fact ancillary to the substantive appointment provisions of paragraph 4. I assumed, consistently with the way such provisions are usually drafted, that since paragraph 4 was clearly the substantive paragraph dealing with the appointment of a Forensic Expert and a Forensic Audit, only the subsequent paragraphs dealt with the “*mechanics*”. I indicated to Mr Imrie KC that he need not address me orally on this matter and refused this head of relief on the simple basis that no case for granting it (as freestanding relief) had been made out.
49. This unfortunate misdirection was (it now seems to me) ultimately immaterial, because I declined to grant the substantive relief paragraph 3 was intended to support (a Forensic Audit) in any event.

Access to the Operational Data (15 March 2021 Order paragraph 2/25 March 2022 Summons paragraphs 4-11)

50. On 24 February 2023, I made an Order substantially in terms of a draft Order handed up by the Company’s counsel, the precise terms of which I left counsel to agree. I stated⁶ :

“Yes. In a sense, we are not much further on from where we were in March 2021, because the reason why I wasn't willing to make an order then was because I didn't feel I had enough information. So it seems to me to be clear that the best way to create the greatest likelihood of getting a sensible outcome, which both sides will be bound to

⁵ Transcript Day 1, page 8 lines 1-3.

⁶ Transcript Day 1, pages 90 line 1-91 line 4.

accept on this issue, is to have an independent forensic expert do what ordinarily one would expect the Company to do, which is to report to the court on the technical and financial implications of either uploading this raw data to the data room, as would be done with other documents, electronic documents, or alternatively examining them in situ. It is equally clear that the legal terrain in the PRC is sufficiently sensitive to make it prudent to also, at this stage, order that the Company and the Dissenter shall jointly appoint a reputable PRC [lawyer] to provide an opinion setting out a procedure for achieving, as proposed in paragraph 2 of the draft order handed up this morning, achieving the lawful review and disclosure. And it should be made clear to the legal adviser that in the first instance all that is in issue is the review process, and so paragraph 2 would need to be modified to that extent. Obviously the terms of the limited order that is being made today will have to be finalised. Hopefully that is something that is capable of agreement between counsel. I don't propose to grant any other relief on the Dissenter's summons and I will give reasons later."

51. In summary, I accepted the inherent reasonableness of the Company's December 9 2022 proposal that rather than the Company undertaking responsibility for exploring the viability of making the Operational Data available to the Experts (and in particular Mr Bezant), it would be better for an independent Forensic Expert to perform this task. The Dissenter had in the past poured scorn on the Company's assertions that affording access was not viable. The Dissenter's proposal that Mr Bezant alone should be charged with reviewing the accessibility of the data and extracting it, in circumstances where it appeared neither the Company nor the Company's Expert had the capacity to do so, was to my mind clearly inappropriate. I found the Dissenter's application for a full-blown Forensic Audit to be obviously unsupportable being based on a predominantly abstract, albeit skilfully articulated, critique of the Company's discovery process to date. It was easy to understand the tactical advantages that the Dissenter might gain by placing a significant roadblock in the path of an already stale action to trial, but impossible to identify proportionately significant defects which justified such extraordinary relief. While the Dissenter's Expert insisted it was necessary to interrogate the Operational Data, he did not go so far as to contend that the discovery of the Company was so deficient that a Forensic Audit was required. One would expect the sort of deficiencies which would justify a forensic audit to be complained of on a joint basis by both Experts and at a far earlier stage in the discovery process.

52. The one notable modification which I made to the Company's proposal was to direct that the costs of the initial review process should be shared by the parties rather than borne solely by the Dissenter, as the Company proposed, or solely by the Company, as the Dissenter proposed. I 'flip-flopped' somewhat in arriving at this conclusion, but a sharing of costs ultimately appeared to me to be consistent with the fact that:

- (a) it would normally be for the Company to incur the up-front costs of uploading documents to the database; however
- (b) the request for access to the Operational Data was an unusual request made solely by the Dissenter's Expert and considered unnecessary by Dr Kennedy, the Company's Expert for the purposes of the Dissenter's disclosure application.

53. There was no material dispute about the Court's jurisdiction to require a Forensic Audit. In the Dissenter's Skeleton Argument, the legal position was described in the following way:

"20. In Qihoo 360 Technology Co. Ltd [2017] (2) CILR 43 [A/5], Mangatal J made an order for the appointment of an independent forensic technology expert to conduct an audit of the Company's IT systems and electronic devices used by or available to the Company and its directors, officers or employees. The order made in that case was in large part identical to the order sought in the present case.

21. Mangatal J was satisfied that the Court had jurisdiction to make such an order and that it was appropriate to do so in the circumstances of the case. The judge observed that:

(i) Such a remedy is an exceptional one but in particular circumstances it may be made, normally after there has been a failure to comply with an order for discovery: [108],

(ii) The Court has inherent jurisdiction to order discovery to be carried out by a forensic IT expert who will perform a forensic audit: [110],

(iii) *Such an order is, in an appropriate case, also in keeping with the overriding objective of dealing with cases justly: [110].*

(iv) *Discovery is of central importance in section 238 proceedings: [112].*

See also the passage from Qihoo quoted at para 23 of the Judgment on the legal importance of discovery in the context of section 238 petitions.

(v) *Exceptional circumstances such as to justify a forensic audit do not require deliberate concealment or destruction of documents: [102], [A/5/55].*

22. *Mangatal J was satisfied in Qihoo that the case was an appropriate one for the making of such an order. Not only was discovery of central importance in section 238 proceedings but the Judge was of the view that the discovery process had not been handled with the care required in order for the Court to ensure that its orders were carried out and that the discovery process was carried out fairly: [102]. Further, the company's approach to discovery in that case had been 'inconsistent and Cavalier', resulting in insufficient discovery under previous orders: [112], [A/5/58].*

23. *The Court of Appeal refused an application by the company for permission to appeal the order of Mangatal J. The Court of Appeal was of the view that there was clear jurisdictional basis for the order, whether under the Court's inherent jurisdiction or under GCR O.24, r.20: [24]-[25]. Further, the Judge had ample grounds for concluding that a forensic audit was the only practical way of ensuring that the company complied with its disclosure obligations: [25].*

24. *It is therefore clear that in an appropriate case the Court may order that an independent expert be appointed to conduct a forensic audit of a party's discovery. It is the Dissenter's submission that this is an appropriate case."*

54. The Dissenter went on to rely upon, *inter alia*, the following factors as justifying the Forensic Audit Order sought:

(a) this Court had expressed concerns about the Company's discovery, reflected in paragraph 2 of the 15 March 2021 Order;

- (b) the Company had failed to file evidence complying with that Order;
- (c) it was impossible to see how Ms Yang could properly depose what the Company believed without disclosing the source for that belief;
- (d) the failure to disclose communications with Harneys in relation to Baidu-held documents had not been adequately explained;
- (e) the Company's evidence about Management Meetings and why it had no documents about the Merger was unsatisfactory.

55. The Company broadly submitted that the concerns expressed by the Court at the March 15-16 2021 hearing had been addressed by Jiang 2 and primarily Yang 2. I was satisfied that they had been adequately addressed based on all the material before me at the 13-14 February 2023 hearing. None of these complaints had real substance; although I agreed with the complaint that Yang 2 did not clearly explain the sources of the Company's stated belief, I regarded this as an entirely technical defect. In its Skeleton Argument, the Company submitted:

“12. Neither Cheung 2 nor Bezant 4 contain evidence to support submissions about why a forensic expert is required to conduct a Forensic Audit, what it is intended to achieve, the identity of any proposed forensic experts, or how the order would work in practice. Bezant 4, as with all of Mr Bezant's affirmations to date, focusses exclusively on his wish to obtain information from the raw operational (historic) data, which he calls 'Operating Data'.”

56. It is helpful by way of illustration of the sort of circumstances which may prompt this Court to order a forensic audit in an appraisal case to reproduce one of the passages in Mangatal J's Judgment in *In Re Qihoo* [2017 (2) CILR 43 at 70 to which Mr Chivers KC referred:

“102 In my judgment, the company has not misunderstood the case or misconceptualized it. What it is saying is that a lot of categories of information do not exist and never have existed in document form, which the dissenters say is incredulous and incapable of belief. The position taken by the company may well be strange. By itself, that is not sufficient for the dissenters to discharge their burden of demonstrating objectively that the documents exist. However, in light of the company's inconsistent

positions, coupled with its cavalier approach to previous aspects of the discovery process, in my judgment there has been an insufficiency of discovery. If anything, the company may have misconceptualized the discovery process. This insufficiency has been established based on the specific facts, as well as the surrounding circumstances. It is such that I cannot say that I find the company's statements that it has given complete and full disclosure reliable. I make a distinction between credibility and reliability, because I am not saying that there has been deliberate concealment or deletion, but rather that the discovery process has not been handled with the care required in order for the court to ensure that its orders are carried out and that the discovery process is carried out fairly." [Emphasis added]

57. In the present case the Company implicitly accepts that it has not given “complete and full discovery”, but for reasons which have been consistently expressed and which appear consistent with the commercial landscape of the present Merger context involving a private company. Most significantly (and in my experience not unusually), its emails were primarily maintained on Baidu’s server. Clearly it ought to have had agreements in place to facilitate access to such documents in the event of litigation, but the Dissenter appeared to me to have accepted that it needed to take action of its own to obtain documents from Baidu. Nonetheless I was satisfied that a coherent discovery exercise was undertaken immediately after the Merger, with 650,000 initial documents being pared down to 22,000 uploaded to the data-room. The admitted fact that the laptops of two senior employees had never been examined, for instance, did not demonstrate that important documents had been overlooked; it merely supported the speculative contention that they may have been. As regards the Operational Data, in relation to which its position after the 15 March 2021 Order had been unsatisfactory, the Dissenter’s valid complaints were met by the Company’s proposed form of Order which I agreed I would make. In addition, what the Court will regard as “complete and full” will never require completeness in an absolute sense. Were this to be required, the discovery stage of litigation in most appraisal cases would never end. As I observed in the course of hearing, there will usually be some way of taking into account at trial material deficiencies in available information.
58. Secondly, and relevant to why I did not consider the discovery deficiencies complained to support the need for a Forensic Audit, the Company invited the Court to accept that in litigation such as the present, the theoretical obligation to give “full disclosure” had to be tempered by principles of

proportionality and the need to distinguish between reasonable discovery requests and oppressive ones. Mr Imrie KC in this regard relied heavily on the following observations of Martin JA in *In Re Qihoo 360 Technology* [2017 (2) 585:

“3. Proceedings under s.238 present two particular difficulties to the courts. First, all or nearly all of the financial information necessary to enable the court to determine the value of a company’s business, and hence of its shares, will inevitably be held by the company itself. The proper conduct of the valuation exercise will accordingly require that the company make adequate disclosure of that information. Secondly, although the task of determining the value is one for the court alone, the court will not usually be equipped to derive a value from the financial information without expert assistance. The consequent importance of the expert evidence means that the court must have confidence that the valuations proposed are based on sufficient information; and that in turn means that the experts will often have to be given a substantial degree of autonomy in determining what information is needed for their valuations. Although care must be taken to ensure that this autonomy is not abused (a point to which we return at the end of these reasons), in general we agree with the statement of Jones, J. in [In re Integra Group](#) (4) (2016 (1) CILR 192, at para. 11) that ‘the experts are the best judge of what information is or is not relevant for their purposes’

27 *As presaged in para. 3 of these reasons, we come back to the possibility of abuse of the autonomy that is of necessity to be given to experts in s.238 proceedings. In para. 63 of her judgment, the judge recorded a submission by leading counsel for the company ‘that s.238 fair value claims must not be allowed to become a carte blanche for dissenters to conduct a ‘drains up’ inspection of the entire business, regardless of relevance to fair value.’ We think there is a danger that the liberty given to the experts to define what is relevant to value could be abused, and even used to put pressure on a company to agree an inflated value for dissenters’ shares rather than accept the wholesale disruption of an external inspection of its physical and electronic records. At para. 114 of her judgment, the judge said that she wished to make it clear that she was not at all holding that an order for appointment of a forensic expert would be appropriate in every s.238 proceeding; and again she was right to do so. It is, however, observable that such orders have been made in at least two cases—this one, and In re*

Shanda Games Ltd. (7) (although in the latter case the order was made by consent)—and we are concerned that they may become accepted practice. We stress that they are to be regarded as exceptional remedies, not common currency in s.238 petitions.” [Emphasis added]

59. These wise words helped to make it clear if the Court should be cautious about requiring a forensic audit called for by an expert, even more caution was required when such exceptional relief was sought by a dissenter without its expert’s support. It was against this background that I had little difficulty in refusing the Dissenter’s application for a forensic Audit and accepted the Company’s proposal for a cautious, step-by-step approach to providing the access to the Operational Data which the Dissenter’s Valuation Expert sought. For the reasons set out under the heading ‘Future Case Management’ below, this is not an encouragement to the parties to deploy stratagems which result in unnecessary delays to the progress of this case.
60. Mr Imrie KC implied that dissenters of the world would rejoice at the prospect of this Court routinely requiring that access be given to merger companies’ entire trading database. To be clear, I do not regard providing such access as something which should become standard practice in all section 238 cases. On the contrary, any such order should be reserved for special circumstances and the scope of such order (if appropriate) should be tailored to meet the proportionate exigencies of the case. The unusual features which have prompted this access being ordered are the fact that:
- (a) the Company was not directly involved in the Merger negotiations so that no evidence of the negotiations was available, unlike the position in the usual case;
 - (b) the Company was not a listed one, so there was no ability to place significant reliance on the market price;
 - (c) the Company for more than 18 months studiously avoided compliance with this Court’s order to seek agreement on providing access to the data; and
 - (d) the Company’s evident inability, for seemingly unique technical reasons, to provide the selected extracts of the data which the Dissenter’s Expert sought as a proportionate alternative to access the Operational Data as a whole.

61. In the course of the hearing the Company's counsel handed up a revised draft of the 9 December 2022 version of the draft Consent Order. This most significantly added a requirement for the Company to preserve the Historic Data. In the course of oral argument, I accepted the further refinement that there would be an initial review stage in which the viability and costs implications of extracting the data would first be considered. I accordingly made an Order broadly along the following lines, subject to the parties seeking to agree the precise terms (especially as regards the initial review stage) of the final Order to be drawn up:

*“1. Xiaodu Life Technology Ltd (the ‘**Company**’) shall grant access to its legacy database which holds historic operational data (‘**Historic Data**’) in the People’s Republic of China (‘**PRC**’) to the Dissenter’s duly appointed representatives on the terms set out in the paragraphs below. For the purposes of this Order, Historic Data shall mean the raw data generated in the course of the Company’s operations prior to the Valuation Date, in the form in which it is currently stored in the Company’s legacy database.*

*2. The Company and the Dissenter shall jointly appoint a reputable PRC legal advisor to provide an opinion to them setting a procedure for achieving the lawful review and disclosure for use in these proceedings of all or any part of the Historic Data (the ‘**Opinion**’). Initially, the Opinion shall be limited to the procedure for carrying out the review of the **Historic Data** and these costs shall in the first instance be borne jointly by the parties without prejudice to their right to subsequently seek an alternative costs order.*

*3. The Company and the Dissenter shall jointly appoint an independent forensic technology expert (the ‘**Forensic Expert**’) to conduct a review of the Historic Data to identify and extract for production in these proceedings that data (‘**Data Review and Extraction Process**’). The Data Review and Extraction Process shall be carried out in strict accordance with the terms of the Opinion. Initially, the Data Review will assess the extent to which data can safely be extracted on the application of any of the parties. The costs of the appointment of the Forensic Expert to conduct the initial Data Review shall in the first instance be borne jointly by the parties without prejudice to their right to subsequently seek an alternative costs order*

4. *The Forensic Expert shall be a person with experience of conducting forensic examination of electronic sources and the appointment shall be approved in advance by agreement of the parties, failing which the Court shall determine the identity of the Forensic Expert.*

5. *The Company shall provide all necessary assistance and access as requested by the Forensic Expert, to the Company's Historic Data. The Company will not delete the Historic Data pending the conclusion of the Data review and Extraction Process...*"

Provisional findings on costs

62. The 15 March 2021 Order (paragraph 5) reserved the costs of the Dissenter's Specific Discovery Summons. This was because the Operational Data issue was itself adjourned with liberty to apply. Looking at the matter in the round, it appears to me to be clear that the Dissenter achieved substantial success on its Specific Discovery Summons in that it has effectively achieved most of the relief it sought through that Summons. On 24 February 2023, its application for the principle of access to be given to the Operational Data was substantively vindicated. The Company failed to use its best endeavours to reach a compromise until 9 December 2022 in an unreasonable refusal to comply with the letter and spirit of paragraph 2 of the 15 March 2021 Order. Accordingly, unless any party applies to be heard as to costs within 28 days of the date of delivery of the present Judgment I make the following provisional costs Order:

"The Company shall pay the Dissenter's costs of the Dissenter's Specific Discovery Summons (to be taxed if not agreed on the standard basis) and the costs relating to the Operational Data issue between 16 March 2021 and 9 December 2022 (to be taxed, if not agreed, on the indemnity basis)."

63. As far as the Dissenter's 25 March 2022 Summons is concerned, the Company clearly appears to have achieved substantial success as all heads of relief were refused and the only Order made was essentially grounded in the Company's 9 December 2022 proposal which the Dissenter rejected. Accordingly, unless any party applies to be heard as to costs within 28 days of the date of delivery of the present Judgment I make the following provisional Order:

“The Dissenter shall pay the Company’s costs of the 25 March 2022 Forensic Audit and Specific Discovery Summons, to be taxed if not agreed on the standard basis.”

Future Case Management

64. Appraisal cases appear to me to raise unique case management challenges because the commercial forces at play weaken the usual disciplining effect of costs orders. The parties are obliged by the Preamble to the Grand Court to assist the Court to achieve the Overriding Objective by conducting their cases in a proportionate and expeditious manner. Yet petitioners and dissenters alike have a legitimate commercial interest in pressurizing each other into settling on commercially favourable terms. Many cases may well settle without costs being taxed at all. While the Court has a duty to encourage the settlement of litigation, this cannot properly be achieved by sanctioning proceedings being conducted in a dilatory and inefficient way. Section 238 is designed to afford a substantive remedy; not to allow litigants to manipulate the processes of the Court with a view to achieving a compromise. In the present case it is difficult to avoid the impression that each side hopes to gain some strategic advantage by proceeding to trial in a manner more akin to a Sunday morning stroll along Seven Mile Beach than a dash along West Bay Road to reach the Court’s door as quickly as possible. Each side has accused the other in correspondence of delaying this action and neither is wholly right or wrong. The Forensic Expert appointment should now be pursued as promptly as possible so that final pre-trial directions can be agreed or ordered, I would provisionally suggest (without directing), no later than the end of July 2023. Unless the parties display more tangible enthusiasm for progressing this 2017 case to trial, the Court will be obliged to consider making case management directions of its own motion and dealing with costs in future interlocutory application by making costs taxable and payable forthwith.

Conclusion

65. These are the reasons for the decision made on 24 February 2023 to refuse the relief sought by the Dissenter’s Forensic Audit and Specific Discovery Summons, save to appoint a Forensic Expert to investigate the viability of the Company affording access to the Operational Data on the terms substantially proposed by the Company in December 2022. I shall hear counsel, if required, on costs and the terms of the Order to be drawn up to give effect to this decision.



230314- In the Matter of Xiaodu Life Technology Ltd – FSD 227 of 2017 (IKJ)- Reasons for Decision

**THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT**